

§ 2640.101

2640.302 Waivers issued pursuant to 18 U.S.C. 208(b)(3).

2640.303 Consultation and notification regarding waivers.

2640.304 Public availability of agency waivers.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 61 FR 66841, Dec. 18, 1996, unless otherwise noted.

Subpart A—General Provisions

§ 2640.101 Purpose.

18 U.S.C. 208(a) prohibits an officer or employee of the executive branch, of any independent agency of the United States, of the District of Columbia, or Federal Reserve bank director, officer, or employee, or any special Government employee from participating in an official capacity in particular matters in which he has a personal financial interest, or in which certain persons or organizations with which he is affiliated have a financial interest. The statute is intended to prevent an employee from allowing personal interests to affect his official actions, and to protect governmental processes from actual or apparent conflicts of interests. However, in certain cases, the nature and size of the financial interest and the nature of the matter in which the employee would act are unlikely to affect an employee's official actions. Accordingly, the statute permits waivers of the disqualification provision in certain cases, either on an individual basis or pursuant to general regulation. Section 208(b)(2) provides that the Director of the Office of Government Ethics may, by regulation, exempt from the general prohibition, financial interests which are too remote or too inconsequential to affect the integrity of the services of the employees to which the prohibition applies. The regulations in this part describe those financial interests. This part also provides guidance to agencies on the factors to consider when issuing individual waivers under 18 U.S.C. 208 (b)(1) or (b)(3), and provides an interpretation of 18 U.S.C. 208(a).

5 CFR Ch. XVI (1–1–04 Edition)

§ 2640.102 Definitions.

For purposes of this part:

(a) *Diversified* means that the fund, trust or plan does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States and, in the case of an employee benefit plan, means that the plan's trustee has a written policy of varying plan investments.

NOTE TO PARAGRAPH (a): A mutual fund is diversified for purposes of this part if it does not have a policy of concentrating its investments in an industry, business, country other than the United States, or single State within the United States. Whether a mutual fund meets this standard may be determined by checking the fund's prospectus or by calling a broker or the manager of the fund. An employee benefit plan is diversified if the plan manager has a written policy of varying assets. This policy might be found in materials describing the plan or may be obtained in a written statement from the plan manager. It is important to note that a mutual fund or employee benefit plan that is diversified for purposes of this part may not necessarily be an excepted investment fund (EIF) for purposes of reporting financial interests pursuant to 5 CFR 2634.310(c). In some cases, an employee may have to report the underlying assets of a fund or plan on his financial disclosure statement even though an exemption set forth in this part would permit the employee to participate in a matter affecting the underlying assets of the fund or plan. Conversely, there may be situations in which no exemption in this part is applicable to the assets of a fund or plan which is properly reported as an EIF on the employee's financial disclosure statement.

(b) *Employee* means an officer or employee of the executive branch of the United States, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia. The term also includes a special Government employee as defined in 18 U.S.C. 202.

(c) *Employee benefit plan* means a plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3), and that has more than one participant. An employee benefit plan is any plan, fund or program established or maintained by

an employer or an employee organization, or both, to provide its participants medical, disability, death, unemployment, or vacation benefits, training programs, day care centers, scholarship funds, prepaid legal services, deferred income, or retirement income.

(d) *He, his, and him* include she, hers, and her.

(e) *Holdings* means portfolio of investments.

(f) *Independent trustee* means a trustee who is independent of the sponsor and the participants in a plan, or is a registered investment advisor.

(g) *Institution of higher education* means an educational institution as defined in 20 U.S.C. 1141(a).

(h) *Issuer* means a person who issues or proposes to issue any security, or has any outstanding security which it has issued.

(i) *Long-term Federal Government security* means a bond or note, except for a U.S. Savings bond, with a maturity of more than one year issued by the United States Treasury pursuant to 31 U.S.C. chapter 31.

(j) *Municipal security* means direct obligation of, or obligation guaranteed as to principal or interest by, a State (or any of its political subdivisions, or any municipal corporate instrumentality of one or more States), or the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(k) *Mutual fund* means an entity which is registered as a management company under the Investment Company Act of 1940, as amended (15 U.S.C. 80a-1 *et seq.*). For purposes of this part, the term mutual fund includes open-end and closed-end mutual funds and registered money market funds.

(l) *Particular matter involving specific parties* includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties. The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties.

(m) *Particular matter of general applicability* means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties.

(n) *Pension plan* means any plan, fund or program maintained by an employer or an employee organization, or both, to provide retirement income to employees, or which results in deferral of income for periods extending to, or beyond, termination of employment.

(o) *Person* means an individual, corporation, company, association, firm, partnership, society or any other organization or institution.

(p) *Publicly traded security* means a security as defined in paragraph (r) of this section and which is:

(1) Registered with the Securities and Exchange Commission pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and listed on a national or regional securities exchange or traded through NASDAQ;

(2) Issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940, as amended (15 U.S.C. 80a-8); or

(3) A corporate bond registered as an offering with the Securities and Exchange Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and issued by an entity whose stock is a publicly traded security.

NOTE TO PARAGRAPH (p): National securities exchanges include the American Stock Exchange and the New York Stock Exchange. Regional exchanges include Boston, Cincinnati, Intermountain (Salt Lake City), Midwest (Chicago), Pacific (Los Angeles and San Francisco), Philadelphia (Philadelphia and Miami), and Spokane stock exchanges.

(q) *Sector mutual fund* means a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single State within the United States.

(r) *Security* means common stock, preferred stock, corporate bond, municipal security, long-term Federal Government security, and limited partnership interest. The term also includes "mutual fund" for purposes of §2640.202(e) and (f) and §2640.203(a).

(s) *Short-term Federal Government security* means a bill with a maturity of one year or less issued by the United

States Treasury pursuant to 31 U.S.C. chapter 31.

(t) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(u) *Unit investment trust* means an investment company as defined in 15 U.S.C. 80a-4(2) that is a regulated investment company under 26 U.S.C. 851.

(v) *United States Savings bond* means a savings bond issued by the United States Treasury pursuant to 31 U.S.C. 3105.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12445, Mar. 19, 2002]

§ 2640.103 Prohibition.

(a) *Statutory prohibition.* Unless permitted by 18 U.S.C. 208(b) (1)–(4), an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The restrictions of 18 U.S.C. 208 are described more fully in 5 CFR 2635.401 and 2635.402.

(1) *Particular matter.* The term “particular matter” includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

Example 1: The Overseas Private Investment Corporation decides to hire a contractor to conduct EEO training for its employees. The award of a contract for training services is a particular matter.

Example 2: The spouse of a high level official of the Internal Revenue Service (IRS) requests a meeting on behalf of her client (a major U.S. corporation) with IRS officials to discuss a provision of IRS regulations governing depreciation of equipment. The spouse will be paid a fee by the corporation for arranging and attending the meeting. The consideration of the spouse's request and the decision to hold the meeting are particular matters in which the spouse has a financial interest.

Example 3: A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter.

Example 4: A change by the Department of Labor to health and safety regulations applicable to all employers in the United States is not a particular matter. The change in the regulations is directed to the interests of a large and diverse group of persons.

Example 5: The allocation of additional resources to the investigation and prosecution of white collar crime by the Department of Justice is not a particular matter. Similarly, deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter.

Example 6: The recommendations of the Council of Economic Advisors to the President about appropriate policies to maintain economic growth and stability are not particular matters. Discussions about economic growth policies are directed to the interests of a large and diverse group of persons.

Example 7: The formulation and implementation of the response of the United States to the military invasion of a U.S. ally is not a particular matter. General deliberations, decisions and actions concerning a response are based on a consideration of the political, military, diplomatic and economic interests of every sector of society and are too diffuse to be focused on the interests of specific individuals or entities. However, at the time consideration is given to actions focused on specific individuals or entities, or a discrete and identifiable class of individuals or entities, the matters under consideration would be particular matters. These would include, for example, discussions whether to close a particular oil pumping station or pipeline in the area where hostilities are taking place, or a decision to seize a particular oil field or oil tanker.

Example 8: A legislative proposal for broad health care reform is not a particular matter because it is not focused on the interests of